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REPORT
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MAJOR FRAUD ACT OF 1988

SEPTEMBER 12 (legislative day, SEPTEMBER 7), 1988.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3911]

The Committee on the Judiciary, to which was referred the bill (H.R. 3911) to amend title 18, United States Code, to provide increased penalties for certain major frauds against the United States, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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I. PURPOSE

The purpose of H.R. 3911, the Major Fraud Act of 1988, is to provide federal prosecutors with an additional criminal statute targeting major procurement fraud committed against the United States. Enactment of this bill is expected to enhance the deterrence, prosecution and punishment of such fraud.

II. LEGISLATIVE HISTORY

The estimated scope of procurement fraud against the United States has steadily increased. Such fraud affects all aspects of the

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federal government's expenditures, from defense contracts to road-building contracts. The extent and nature of federal government procurement fraud has been extensively documented in congressional, Department of Justice, Department of Defense and private investigations and reports. The record of fraud is alarming:

> Theft is the most prevalent type of fraud, representing about 33 percent of cases. Items alleged to be the target of thefts range from copier paper to funds from sales in an Army/Air Force exchange service florist shop.

General Accounting Office, "DOD Fraud Investigations: Characteristics, Sanctions, and Prevention," January 1988, pp. 18, 24–25.

> Procurement fraud is the most costly kind of fraud, accounting for about 18 percent of total losses. The Department of Defense reports losses of $99.1 million due to procurement fraud for fiscal years 1986 and 1987.

Id. at 18, 20.

Prosecutions of individual companies reveal other disturbing facts:

> Two corporate officials of Spring Works, Inc., were convicted of deliberately providing defective springs for installation in critical assemblies of the CH–47 helicopters, the Cruise Missile and the F–18 and B–1 aircraft.

Testimony of the Honorable June Gibbs Brown, Inspector General, Department of Defense, before the Senate Committee on the Judiciary, July 12, 1988 at 9.

> Two corporate officials of MKB Manufacturing were sentenced for their role in the deliberate provision of defective gas pistons for installation in the M60 machine gun. Installation of the defective part would cause the machine gun to jam.

Id. at 10.

Thus, the evidence shows that besides causing financial losses, procurement fraud could cause the loss of life of American soldiers and could threaten national security.

These facts compel a legislative response. Through this bill, the committee seeks to complement action taken in the 99th Congress to address procurement fraud through civil statutes: the False Claims Amendments Act of 1986 and the Program Fraud Civil Remedies Act.

H.R. 3911 was originally introduced in the House of Representatives as H.R. 3500 by Congressman William J. Hughes. At the Subcommittee on Crime's markup, Mr. Hughes offered an amendment in the nature of a substitute which was reported as H.R. 3911 and cosponsored by all the members of the subcommittee. The subcommittee made further changes to the bill before reporting it to the full Committee on the Judiciary. The full committee adopted two clarifying amendments and favorably reported the bill to the House of Representatives by voice vote. The House of Representatives approved the bill under suspension of the rules on May 10, 1988, by a vote of 419 to 0.

Upon reception by the Senate, H.R. 3911 was referred to the Committee on the Judiciary. The committee held a hearing on July 12, 1988 and considered the bill during its markup on August 10, 1988.

III. Discussion

Section 2 of the Major Fraud Act of 1988 would establish the criminal offense of major procurement fraud committed against the United States. This new provision would apply to fraud committed in connection with a contract, or subcontract or any part of a contract or subcontract worth at least $1 million. The penalty for a violation of the provision is a fine of up to $1 million, imprisonment for up to 10 years, or both. A fine of up to $5 million may be levied in two circumstances:

(1) if the gross loss to the government or the gross gain to the defendant is $500,000 or more; or

(2) the violation involved a "conscious or reckless risk" of serious personal injury.

The bill provides for a maximum fine of up to $10 million for each prosecution under the new section created by the bill, including a prosecution with multiple counts. The $10 million cap for a fine under this bill does not limit the imposition of multiple penalties, exceeding $10 million in the aggregate, if the additional fine is levied under a different statute. The bill specifically refers to 18 U.S.C. 3571(d) as an example of such a statute. Thus, the penalties in the bill are in addition to, not in lieu of, any other criminal penalties provided by law.

In setting the amount of a fine, the court is directed to make the fine proportional to the offense and to consider the egregiousness of the conduct, the amount of loss or gain, the existence of past convictions or judgments for illegal conduct against the United States and any other factor relevant to a determination of the amount of the fine.

In recognition of the extraordinary complexity of procurement fraud cases, the bill provides for a statute of limitations period of 7 years after the offense is committed, plus any additional time provided under 18 U.S.C. 3292 (related to obtaining foreign evidence). The specific reference to Section 3292 is not intended to render inapplicable other tolling provisions which would be applicable, e.g., fugitivity provisions in Chapter 213 of Title 18.

Subsection (g) of new Section 1031 establishes a financial incentive system to encourage so-called "whistle-blowers." Under the bill, the Attorney General may petition the court for a payment to be made to an individual who provides information leading to a conviction. The payment would be made from the criminal fine levied in the case and may not exceed the lesser of $250,000 or 10 percent of the fine imposed.

An individual is not eligible to receive a payment under subsection (g) in certain circumstances. No payment may be made if it was part of the individual's official duties as a government employee to furnish the information. The individual must be the "original source" of the information since this subsection is meant to encourage individuals to come forward with information about procure-

ment fraud. There is no reason to reward an individual for providing information that is public knowledge. A person would be ineligible to receive any payment, however, if the individual participated in the offense.

Subsection (h) of new Section 1031 provides job protections for employees who further a prosecution under the bill and in no way participated in the commission of the unlawful activity. The bill specifically protects against an employee's being discharged, demoted, suspended, threatened, harassed or discriminated against in employment. It provides for the bringing of a civil action and the granting of broad relief.

Subsection (b) of Section 2 directs the U.S. Sentencing Commission to promulgate new or amend existing guidelines to incorporate the enhanced penalities in cases where conscious or reckless risk of serious personal injury has occurred.

Section 3, added to the bill as an amendment proposed by Senator Grassley, would add a new Section 293 to Chapter 15 of Title 18. This provision is intended to change certain statutory and regulatory provisions to conform the treatment of contractors' legal fees and other proceeding costs to that afforded other private parties in litigation with the federal government.

Under current federal law, government contractors are permitted to bill the government for the cost of expenses incurred in fraud proceedings, as an element of contract cost, unless there is a conviction, civil judgment, or a decision to suspend or debar the contractor. See 10 U.S.C. 2324(e)(1)(C); 48 C.F.R. 31.205–47 (1987).[1]

Recovery for such expenses by a criminal defendant is otherwise without precedent in American law. In virtually no other case [2] is a criminal defendant permitted to recover the cost of the legal defense from the government. The guilt or innocence of the defendant is irrelveant to this general prohibition on the recovery of proceeding costs. Thus, criminal defendants who are acquitted have never been entitled to recover incurred expenses.

In civil cases, private parties that prevail over the government can recover legal expenses only by specific statutory authorization, such as the Equal Access to Justice Act [5 U.S.C. 504(a); 28 U.S.C. 2412(d)] which generally limits legal fee recovery to $75 per hour.

Section 2 would preclude the inclusion of proceeding costs incurred in defense of any covered proceeding brought by the United States or a State alleging a violation of, or failure to comply with, any federal or State law or regulation.

The costs are not allowable if the proceeding results in:

(1) an information, federal grand jury indictment or conviction;

(2) the assessment of a monetary penalty;

(3) a civil judgment containing a finding of liability;

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[1] There have been public reports that in procurement fraud cases, government contractors have recovered several million dollars in legal fees, per case.

[2] The Ethics in Government Act [28 U.S.C. 593], as amended in 1982 by P.L. 97–409, permits the award of legal expenses to public officials who have been investigated for criminal wrongdoing by an independent counsel under the provision of the Act, only if there is no indictment and the expenses would not have been incurred, "but for" the independent counsel provisions of the Act. Importantly, under no circumstances can legal expenses be reimbursed under the Act if a prosecution is dropped after indictment, or if the prosecution ends in acquittal.

(4) a decision to debar or suspend the contractor or to rescind or otherwise terminate a contract; and

(5) a consent decree where the government sought the relief described above.

In any other case, proceeding costs will be allowable to the extent not in excess of the rate specified in the Equal Access to Justice Act.

Thus this section is intended to treat the proceeding costs, including legal expenses, of contractors in the same manner as for other private parties involved in litigation with the federal government.

Just as in the Equal Access to Justice Act, Subsection (b) of this section provides an exception to the legal costs limitation where there is a special factor, such as the limited availability of qualified attorneys, which justifies a higher award.

Among other grounds for preclusion of proceeding costs, this section bars recovery of costs upon issuance of a criminal information, or indictment by a federal grand jury. It is the committee's belief that where the fraud investigation was reasonably founded, that is, based on probable cause, the contractor should not be permitted to pass along the costs of the defense to the government, even though there may be insufficient evidence to prove guilt beyond a reasonable doubt or the indictment is subsequently dismissed for unrelated reasons. The return of an indictment or information provides an objective measure of the existence of probable cause.[3]

As pointed out earlier, this section is fully consistent with the legal fees treatment of an indictment under the Ethics in Government Act.

The Department of Justice, by letter to the Chairman of the Committee dated August 3, 1988, expressed its support for the cap on legal expenses embodied in Section 2, as part of any procurement fraud reform package.

Sections 4, 5 and 6 of the bill, also added as an amendment offered by Senator Grassley, are aimed at redressing the current inadequacy of government resources specifically dedicated to civil and criminal fraud matters. The Grassley amendment recognizes that while an increase in the sanctions for fraud is a worthy achievement, enforcement of any fraud law requires a vigorous and adequately funded Department of Justice.

There is no doubt that the government is currently overmatched, from a resource standpoint, in its effort to vigorously enforce our anti-fraud laws. As the Department of Justice conceded in an August 2, 1988, letter to Chairman Biden:

> There is no question that in cases involving large corporations which have defrauded the government, the financial capability of such defendants enables them to assemble legal resources for their defense far surpassing those the government can assign to the same case. Indeed, it is common for government counsel to find themselves outnumbered by five and even ten times in strongly contested

[3] In this respect, the section follows a Department of Justice proposal entitled "Anti-Fraud Enforcement Act of 1987" (part G), which was sent to Congress on September 23, 1987.

cases. The support enjoyed by defense counsel in terms of clerical, paralegal and junior attorney personnel also far exceeds anything available to the prosecuting attorney.

This amendment to the Major Fraud Act, which authorizes additional resources specifically dedicated to government fraud cases, is intended to reduce the vast resource disparity that presently exists.

Sections 4 and 5 earmark an additional $8 million authorization for fiscal year 1989 and such sums as may be necessary for each of the four succeeding fiscal years, for additional assistant U.S. attorney positions and support staff positions. These positions are to be primarily dedicated to the investigation and prosecution of government fraud. Thus, although the committee recognizes that control of the additional resources will be in the hands of an individual U.S. attorney, the committee expects that these resources will rarely, if ever, be used for other prosecution priorities.

The Attorney General shall determine the locations for the assignment of these additional resources. The committee intends that the Attorney General will use special care in designating the U.S. attorney offices for the additional staff. This will ensure that the impact of the additional resources is not diminished. Subsection (c) of Section 4 provides specific guidance to assist the Attorney General in the selection of locations for the additional resources. It is the committee's expectation that these additional resources will be concentrated to meet the needs of vigorous anti-fraud enforcement. Care should be taken to avoid the dissipation of these scarce prosecutorial resources. The committee will reevaluate the Department's performance in this regard as a part of its annual reauthorization of these specific resources.

Section 6 requires the Attorney General to report annually to the Congress on, and to specifically account for, the activity of each U.S. attorney office to which additional resources are assigned.

To comply with this important congressional oversight feature, individual U.S. attorney offices should assist the Attorney General by compiling accurate statistics on

(1) the number of fraud case referrals, from the Department of Defense and other agencies;

(2) the number of attorneys and support staff dedicated pursuant to this provision;

(3) the number of investigative agents assigned to each investigation, and the period of time each investigation has been pending;

(4) the record to convictions, acquittals and other dispositions achieved by those assigned to positions established by this provision; and

(5) the record of the sentences, recoveries and penalties achieved by individuals assigned to positions established by this provision.

Full compliance with this section by the Attorney General is most critical. It ensures that the Department of Justice will be accountable to the Congress for the additional and scarce resources now made available by this Act.

IV. Vote of the Committee

On August 10, 1988, with a quorum present, the Committee on the Judiciary ordered Senator Metzenbaum's amendment in the nature of a substitute, as amended, favorably reported by voice vote.

At markup, Senator Grassley offered two amendments, both of which were approved by the committee without objection. The first amendment would limit the ability of government contractors to recover costs incurred in a proceeding brought by the government for a violation of, or failure to comply with, any federal or state law or regulation. The second amendment would authorize an additional expenditure of $8 million by the Department of Justice for additional assistant U.S. attorneys and support staff to investigate and prosecute fraund against the government.

Senator Hatch also offered an amendment which would reduce the maximum fine for fraud not involving a risk of serious personal injury from $5 million to $1 million. The amendment was defeated by a vote of 2 to 8.

YEAS	NAYS
Senator Hatch	Senator Kennedy
Senator Humphrey	Senator Metzenbaum
	Senator Leahy
	Senator Simon
	Senator Thurmond
	Senator Simpson
	Senator Grassley
	Senator Specter

V. Text of H.R. 3911

[100th Cong., 2d Sess.]

A BILL To amend title 18, United State Code, to provide increased penalties for certain major frauds against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

That Act may be cited as the "Major Fraud Act of 1988".

SEC. 2. CHAPTER 47 AMENDMENT.

(a) In General.—Chapter 47 of title 18, United States Code, is amended by adding at the end the following:

"SEC. 1031. MAJOR FRAUD AGAINST THE UNITED STATES.

"(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

"(1) to defraud the United States; or

"(2) to obtain money or property from the United States by means of false or fraudulent pretenses, representations, or promises,

in any procurement of property or services for the Government, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more, shall, subject to the applicability of subsection (c) of this section, be fined

not more than $1,000,000 or imprisoned not more than 10 years, or both.

"(b) The fine imposed for an offense under this section may exceed the maximum otherwise by law, if such fine does not exceed $5,000,000 and

"(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

"(2) the offensive involved a conscious or reckless risk of serious personal injury.

"(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10 million.

"(d) Nothing in this section shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).

"(e) The amount of any fine imposed under this section shall be proportional to the offense. In determining the amount of the fine, the court shall take into account—

"(A) the egregiousness of the conduct proven at trial;

"(B) the amount of the loss or gain resulting therefrom;

"(C) any past convictions or judgments for fraudulent or other illegal acts against the United States entered against the defendant; and

"(D) any other factors deemed by the court to be relevant to determining the amount of the fine to be imposed.

"(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time allowed under 18 U.S.C. section 3292.

"(g)(1) Upon application by the Attorney General, the court may order a payment from a criminal fine under this section to an individual who furnished information leading to the conviction under this section. The amount of such payment shall not exceed the lesser of $250,000 or 10 percent of the criminal fine imposed under this section.

"(2) An individual is not eligible for such a payment if—

"(A) that individual is an officer or employee of a government who furnishes information or renders service in the performance of official duties;

"(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual had justifiable reasons for that failure;

"(C) the furnished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government; or

"(D) that individual participated in the violation of this section with respect to which such payment would be made.

"(h) Any individual who—

"(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution); and

"(2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees."

(b) SENTENCING GUIDELINES.—Pursuant to its authority under 28 U.S.C. section 994(p) and section 21 of the Sentencing Act of 1987, the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide for appropriate penalty enhancements, including an additional incarceration of 2 years in cases under this section, where conscious or reckless risk or serious personal injury resulting from the fraud has occurred.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 47 of title 18, United States Code, is amended by adding at the end the following new item: "1031. Major fraud against the United States."

SEC. 3. LIMITATION ON ALLOWABILITY OF COSTS OF CONTRACTORS INCURRED IN CERTAIN PROCEEDINGS.

(a) IN GENERAL.—Chapter 15 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 293. Limitation on Government contract costs

"(a) Any proceeding costs incurred in connection with any proceeding brought by the United States or a State government that relates to a violation of, or failure to comply with, any Federal or State law or regulation on the part of the contractor are not allowable costs in a covered contract if the proceeding results in any of the following:

"(1) an indictment by a Federal grand jury, or a conviction (including a conviction pursuant to a plea of nolo contendre) by reason of such violation or failure to comply;

"(2) the assessment of a monetary penalty by reason of a civil or administrative finding of such violation or failure to comply;

"(3) a civil judgment containing a finding of liability, or an administrative finding of liability, by reason of such violation or failure to comply, if the charges which are the subject of the proceeding involve fraud or similar offenses;

"(4) a decision to debar or suspend the contractor or rescind, void, or terminate a contract for default, by reason of such violation or failure to comply; or

"(5) the resolution of the proceeding by consent or compromise, where the penalty or relief sought by the government included the actions described in paragraphs (1) through (5).

"(b) In any proceeding brought by the United States or a State government that does not result in any of the actions described in paragraphs (1) through (5) of subsection (a), costs for legal services incurred by a contractor in connection with such proceeding shall not be allowed in excess of the rate specified in the Equal Access to Justice Act (28 U.S.C. 2412(d)(2)(A); 5 U.S.C. 504(a)) unless the responsible contracting officer finds that a special factor (such as the limited availability of qualified attorneys or agents) justifies an award of higher rates.

"(c) For purposes of this section—

"(1) the term 'covered contract' means a contract for an amount more than $100,000 entered into by a department or agency of the United States other than a fixed-price contract without costs incentives;

"(2) the term 'proceeding' means a civil, criminal, or an administrative investigation, prosecution, or proceeding; and

"(3) the term 'proceeding costs' means all costs relating to a proceeding incurred before, during, or after the commencement of the proceeding, and such term includes—

"(A) adminstrative and clerical expenses;

"(B) the cost of legal services (whether performed by an employee of the contractor or otherwise);

"(C) the cost of the services of accountants and consultants retained by a contractor; and

"(D) the salaries and wages of employees, including officers and directors.".

(b) AMENDMENT TO CHAPTER ANALYSIS.—The chapter analysis for chapter 15 of title 18, United States Code, by adding at the end thereof the following:

"293. Limitation on Government contract costs.".

(c) APPLICABILITY.—The amendments made by this section shall apply to contracts entered into after the date of the enactment of this Act.

SEC. 4. ESTABLISHMENT OF ADDITIONAL ASSISTANT UNITED STATES ATTORNEY AND SUPPORT PROVISIONS.

(a) ESTABLISHMENT OF POSITIONS.—Subject to the funding authorization limitations in Section 5(a), there are hereby established within the Department of Justice additional Assistant United States Attorney positions and additional support staff positions for prosecuting cases under both the criminal and civil statutes.

(b) FUNCTION OF PERSONNEL.—The primary function of individuals selected for the positions specified in subsection (a) shall be dedicated to the investigation and prosecution of fraud against the government.

(c) LOCATIONS.—The Attorney General shall determine the locations for assignment of such personnel. In making such determination the Attorney General shall consider concentrations of government programs and procurements and concentrations of pending government fraud investigations and allegations.

SEC. 5. AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATION.—Subject to the provisions of subsection (b), for the purpose of carrying out the purposes of this Act there are authorized to be appropriated $8,000,000 for fiscal year 1989, and such sums as may be necessary for each of the four succeeding fiscal years, to be available until expended.

(b) LIMITATION.—Before expending funds appropriated pursuant to subsection (a) to carry out the purposes of this section, the Attorney General shall utilize available existing resources within the Department of Justice for such purposes.

SEC. 6 CONGRESSIONAL OVERSIGHT.

Commencing with the first year after the date of enactment of this section, the Attorney General shall annually report to the Congress with respect to—

(1) the number of referrals of fraud cases by the Department of Defense of defense contractors (with specific statistics with respect to the 100 largest contractors), the number of open investigation of such contractors, and a breakdown of to which United States Attorney's Office or other component of the Department of Justice each such case was referred;

(2) the number of referrals of fraud cases from other agencies or sources;

(3) the number of attorneys and support staff assigned pursuant to this Act;

(4) the number of investigative agents assigned to each investigation and the period of time each investigation has been opened;

(5) the number of convictions and acquittals achieved by individuals assigned to positions established by the Act; and

(6) the sentences, recoveries, and penalties achieved by individuals assigned to positions established by this Act.

VI. SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 provides that this Act may be cited as the "Major Fraud Act of 1988."

SECTION 2(a)

The bill creates a new criminal prohibition to be added to Title 18 of the United States Code as Section 1031. Subsection 1031(a) sets out the basic offense of major fraud against the United States. It imposes criminal penalties on a person who "knowingly executes, or attempts to execute, any scheme or artifice with the intent—(1) to defraud the United States; or (2) to obtain money or property from the United States by means of false or fraudulent pretenses, representations, or promises" in connection with procurement covered by the subsection.

The phrase "scheme or artifice" should be interpreted in the same manner as that phrase is interpreted under the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343. According to well-established case law, the phrase "is to be interpreted broadly." *McNally* v. *United States,* 107 S.Ct. 2875, 2879–80 (1987). The Court

has rejected the argument that "the statute reaches only such cases as, at common law, would come within the definition of 'false pretenses,' in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the nature." Id. The Court has interpreted the phrase to "includ[e] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." Id.

Section 1031(a) applies to procurement fraud "if the value of the contract, subcontract, or any constituent part thereof * * * is $1,000,000 or more." The phrase "value of the contract" refers to the value of the contract award, or the amount the government has agreed to pay to the provider of services whether or not this sum represents a profit to the contracting company. Furthermore, a subcontractor awarded a subcontract valued at $1,000,000 or more is covered by this section, regardless of the amount of the contract award to the contractor or other subcontractors.

The maximum penalty for a violation of subsection (a) is imprisonment of 10 years or a fine of $1,000,000 or both unless the requirements for a higher penalty as provided in subsection (b) are met.

Subsection 1031(b) provides for a higher penalty if:

(1) the gross loss to the government or the gross gain to the defendant is $500,000 or greater; or

(2) the offense involves a conscious or reckless risk of serious personal injury.

The term "serious injury" is intended to mean severe injury, such as fractures, severe lacerations, or damage to internal organs, or injury which could result in temporary or permanent disability, but does not necessarily mean life-threatening injury. The term "conscious" means the defendant knew of the risk. The committee intends the term "reckless" to be interpreted consistently with the generally understood requirements for a finding of recklessness or criminal negligence. The term does not include negligent acts or omissions which may create grounds for liability in civil cases but which fall short of the standard for recklessness. Cf. *U.S.* v. *Schmidt,* 626 F.2d 616 (8th Cir. 1980), cert. denied, 449 U.S. 904 (1980); *Broad* v. *Rockwell International Corp.,* 614 F.2d 418, 439–41 (5th Cir. 1980).

Subsection 1031(c) provides that the "maximum fine imposed upon a defendant for a prosecution, including a prosecution with multiple counts, under this section shall not exceed $10 million." This provision was included to address a concern that the government may charge in a single judicial proceeding that a large number of related incidents are separate violations of this section. The committee determined that, except as otherwise expressly provided in Section 1031(d), the aggregate of fines that a court may impose under this section in a single judiciary proceeding is $10 million for any single defendant, regardless of the number of counts or violations of this section which are alleged. This limitation does not prevent multiple proceedings, for example, where several independent schemes or artifices have been perpetrated by the same defendant. A corporation and its various parts or divisions, which are included within the same corporation, constitute the same defendant for purposes of this limitation.

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Some have expressed concern that the limitation in Subsection 1031(c) could be interpreted to permit prosecutors to bring multiple prosecutions against separate subsidiaries or divisions of a single corporate defendant, for conduct which would otherwise be prosecuted in a single proceeding, in order to circumvent the $10 million limitation. It is the committee's view that a single corporate defendant should not be subjected to multiple $10 million fines where there is in fact a single scheme, regardless of the number of prosecutions brought. Rule 8 of the Federal Rules of Criminal Procedure has long favored the joinder of offenses where they arise from "acts or transactions connected together or constituting parts of a common scheme or plan." *Fed. R. Crim. Proc.* 8(a), in order to "provide economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the rights of the defendants to a fair trial." *Burton* v. *United States,* 391 U.S. 123, 131 n. 6 (1968). Moreover, such an effort to prosecute a single scheme against a single defendant in separate proceedings may well run afoul of the double Jeopardy Clause. See, e.g., *United States* v. *Castro,* 629 F. 2d 456 (7th Cir. 1980); *United States* v. *Marable,* 578 F. 2d 151, 153 (5th Cir. 1978); *United States* v. *Mallah,* 503 F. 2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975). It is the committee's view, however, that even where a defendant cannot prove a constitutional violation arising out of multiple prosecutions, it is proper for a sentencing court to consider, in determining whether to go beyond the $10 million limitation, the kinds of factors discussed in the *Castro* case, supra, 629 F. 2d at 461, to determine whether the schemes charged in the separate prosecutions are in fact so closely intertwined as to make it appropriate for the court to apply the limitation in Subsection 1031(c).

The committee also notes that Sentencing Guidelines and Policy Statements issued by the U.S. Sentencing Commission address the procedures for determining the appropriate penalties in multiple count cases. (See Section 3D and accompanying commentary.) The committee does not intend to supersede or nullify in any way the application of these provisions in appropriate cases.

Subsection 1031(d) allows a sentence provided for under other sections of Title 18 to be imposed regardless of the limitations in new Section 1031. For example, the court may impose a penalty based on twice the gross loss or gain involved in the offense under 18 U.S.C. 3571(d) despite either the $1 million (or $5 million) maximum fine per count, or the $10 million cap on the aggregate fine for all counts.

Subsection 1031(e) provides that the amount of any fine imposed under this section shall be "proportional to the offense." The committee does not intend that the proportionality requirement be a precise mathematical requirement, but rather that the size of the monetary fine be related to the magnitude and seriousness of the offense, taking into account the factors provided in subsection (e). The court may also take into account "any other factors deemed by the court to be relevant" including the Sentencing Guidelines and information submitted by the government in the case of sentencing pursuant to a plea of guilty or nolo contendere.

The committee did not attempt to modify or establish new principles regarding respondeat superior and other forms of vicarious liability in criminal prosecutions. Leading cases on this subject include, for example, *United States* v. *Beusch,* 596 F. 2d 871 (9th Cir. 1979); and *United States* v. *Hilton Hotels Corp.,* 467 F. 2d 1000, 1004–1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). In order for the corporation to be liable for a crime involving a mental element, it is necessary to prove that the agent acted within the scope of his or her actual or apparent authority and with the intent to benefit the corporation. See, also, *United States* v. *Automated Medical Laboratories, Inc.,* 770 F. 2d 399, 407 (4th Cir. 1985); *United States* v. *Cincotta,* 689 F. 2d 238, 241–42 (1st Cir. 1982) cert denied, 459 U.S. 991 (1982).

In addition, under the "collective knowledge" doctrine, the requisite knowledge of a corporation may be established by imputing to the corporation the aggregate or collective knowledge of its employees as a group. A "collective knowledge" jury instruction has been affirmed in connection with corporate criminal liability. See, e.g., *United States* v. *Bank of New England,* 821 F. 2d 844 (1st Cir.), cert. denied, —— U.S. ——, 108 S. Ct. 328 (1987) *(Bank of New England); Rish & Company* v. *United States,* 262 F. 2d 245, 250 (8th Cir. 1958); *Inland Freight Lines* v. *United States,* 191 F. 2d 313, 315 (10th Cir. 1951); *Camacho* v. *Bowling,* 562 F. Supp. 1012, 1025 (N.D. Ill. 1983); *United States,* v. *T.I.M.E.-D.C., Inc.,* 381 F. Supp. 730, 738–39 (W.D.W.Va. 1974); *United States* v. *Sawyer Transport, Inc.,* 337 F. Supp. 29 (D. Minn. 1971), aff'd, 463 F. 2d 175 (8th Cir. 1972).

It is also clear that a corporation may be held criminally responsible for acts committed by its employees if they acted within the scope of their actual or apparent authority and for the benefit of the corporation even if such acts were against corporate policy or express instructions. See e.q., *Hilton Hotels, supra; United States* v. *American Radiator & Standard Sanitary Corp.,* 433 F.2d 174, 204–5 (3d Cir. 1970), cert. denied, 401 U.S.C 948 (1971). On the other hand, whether the employee acted contrary to corporate policy or to express instructions is relevant in determining whether the employee was acting for the benefit of the employer and whether the employee acted within the scope of his or her actual or apparent authority. *United States* v. *Beusch, supra,* 596 F. 2d at 878.

Subsection 1031(f) extends the statute of limitations from the current period of 5 years to 7 years. Under current law, the running of the statute of limitations would be tolled in the circumstances provided under 18 U.S.C. 3292. The bill makes clear that this tolling provision also applies to the calculation of the statute of limitations period under new Section 1031. The general rule that the limitations period does not run during a period of fraudulent concealment also applies, as would other statutory or judicially established bases for tolling the limitations period.

Subsection 1031(g) authorizes the court to award a payment from a criminal fine under this section to an individual furnishing information leading to a conviction under this section. Any award may be made only upon application by the Attorney General. The amount of the award may not exceed the lesser of $250,000 or 10 percent of the fine.

Subsection (g)(2) sets out a number of instances where an award is precluded including cases where:

(1) the individual is an officer or employee of the government who furnishes information or renders services in the performance of official duties;

(2) the individual failed to furnish the information to his or her employer prior to furnishing it to law enforcement authorities, unless the court determines the individual had justifiable reasons for the failure;

(3) the information is based upon public disclosure of facts already revealed in a hearing or investigation "unless the person is the original source of the information"; and

(4) the individual participated in the violation of this section with respect to which such payment would be made.

Subsection (g)(2)(C) further specifies that an "original source" of information is someone who has direct and independent knowledge of the information and has voluntarily provided the information to the government.

Subsection 1031(h) provides a civil cause of action for a person who is discharged or otherwise adversely affected by an employer because of the employee's actions in furtherance of a prosecution under this section. This provision is similar to the one included in the False Claims Act Amendments of 1986 (31 U.S.C. 3730h as added by P.L. 99-562, Oct. 27, 1986).

SUBSECTION 2(b)

This section of the bill provides that the U.S. Sentencing Commission shall promulate guidelines or amend its existing guidelines to provide for an appropriate penalty enhancement, including an additional 2 years incarceration, in the event of a violation under this section where conscious or reckless risk of serious personal injury resulted from the violation. H.R. 3911 as passed by the House of Representatives provided for a 2-year minimum sentence in the case of a violation where risk of personal injury is involved. The committee's intent is that the Sentencing Guidelines should indicate the circumstances in which such an enhanced sentence would and would not be appropriate.

SUBSECTION 2(c)

Section 2(c) contains a clerical amendment to conform the Table of Sections at the beginning of Chapter 47 of Title 18 to the addition made by Section 2.

SECTION 3

Section 3 would add a new Section 293 to Chapter 15 of Title 18. This section would preclude the inclusion of "proceeding costs" in the costs allowable in a covered contract. The proceedings covered by this section are those that relate to a contractor's violation of, or failure to comply with, any Federal or State law or regulation. The costs are not allowable if the proceeding results in:

(1) an information, indictment by a Federal grand jury, or a conviction;

(2) the assessment of a monetary penalty upon a civil or administrative finding of a violation or failure to comply;

(3) a civil judgment containing a finding of liability or an administrative finding of liability if the charges involved fraud or similar offenses;

(4) a decision to debar or suspend the contractor or rescind, void or terminate a contract or default by reason of a violation or failure to comply; or

(5) a consent decree or compromise in a proceeding where the government sought one of the above four penalties or relief.

Subsection (b) of new Section 293 prohibits the recovery of costs for legal services incurred by a contractor in a covered proceeding in excess of the rate specified in the Equal Access to Justice Act if the government proceeding does not result in one of the five dispositions described in subsection (a) of new Section 293. This limitation on recovery does not apply if the responsible contracting officer finds that a special factor justifies an award of higher rates.

SECTIONS 4, 5 AND 6

Sections 4 and 5 would authorize expenditure by the Department of Justice of $8 million for fiscal year 1989 and sums as may be necessary for each of the four succeeding fiscal years. The funds would be earmarked for additional assistant U.S. attorneys and support staff involved in prosecuting criminal and civil fraud against the government.

Section 6 would require the Attorney General to submit an annual report to Congress containing data related to the number of referrals of fraud cases, the number of personnel assigned to prosecute government fraud under Sections 4 and 5, the number of investigators assigned to each investigation along with the length of each investigation, the number of convictions and acquittals for procurement fraud and the sentences, recoveries and penalties achieved for government fraud.

VII. Cost Estimate

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 3911.

2. Bill title: Major Fraud Act of 1988.

3. Bill status: As ordered reported by the Senate Committee on the Judiciary, August 10, 1988.

4. Bill purpose: H.R. 3911 would amend Chapter 47 of Title 18, U.S. Code, to create a new federal procurement fraud offense applicable to contract or subcontracts of $1 million or more. Violation of this offense would result in fines and/or imprisonment for no more than 10 years. The bill would also:

Provide for rewards, which would be paid out of criminal fines, for people who provide information leading to conviction under this new law;

Establish an indefinite number of additional Assistant U.S. Attorney positions to investigate and prosecute cases of fraud against the government; and

Authorize $8 million for fiscal year 1989 and such sums as may be necessary for fiscal years 1990 through 1993 for these new positions.

5. Estimated cost to the federal government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Estimated authorizations	8	8	9	9	10
Estimated outlays	4	8	9	9	10

The costs of this bill fall within budget function 750.

Enactment of this bill could also serve to reduce the federal government's procurement costs if the bill serves as as deterrent to procurement fraud. These savings are highly uncertain, however, and cannot be quantified by CBO.

Basis of estimate: For the purpose of this estimate, CBO assumes that H.R. 3911 will be enacted by early in fiscal year 1989, and that the full amount authorized for 1989 will be appropriated. The authorizations for fiscal years 1990 through 1993 were estimated by assuming that the spending level established for fiscal year 1989 would continue, with adjustments for inflation. CBO assumes that outlays in fiscal year 1989 would be relatively low because the new positions would have to be filled over the course of the year. Otherwise, outlay estimates are based on historical spending patterns.

H.R. 3911 would also require the Attorney General to submit a report to the Congress each year with information on fraud cases and staff levels devoted to these cases. CBO expects this requirement would cost about $0.1 million per year.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: On May 5, 1988, CBO prepared a cost estimate for H.R. 3911, as ordered reported by the House Committee on the Judiciary. The House version of the bill was very similar to this one, but would not authorize any additional funding for Assistant U.S. Attorneys.

9. Estimate prepared by: Marjorie Miller.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

VIII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the Act will not have a direct regulatory impact.

IX. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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Title 18—Crimes and Criminal Procedure

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CHAPTER 15—CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT

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Sec.
281. Restrictions on retired military officers regarding certain matters affecting the Government.
[282-284. Repealed]
293. Limitation on Government contract costs.

* * * * * * *

§ 281. Restrictions on retired military officers regarding certain matters affecting the Government

(a)(1) A retired officer of the Armed Forces who, while not on active duty and within two years after release from active duty, directly or indirectly receives (or agrees to receive) any compensation for representation of any person in the sale of anything to the United States through the military department in which the officer is retired (in the case of an officer of the Army, Navy, Air Force, or Marine Corps) or through the Department of Transportation (in the case of an officer of the Coast Guard) shall be fined under this title [18 USCS §§ 1 et seq.] or imprisoned not more than two years, or both.

* * * * * * *

§ 292. Solicitation of employment and receipt of unapproved fees concerning Federal employees' compensation

Whoever solicits employment for himself or another in respect to a case, claim, or award for compensation under, or to be brought under, subchapter I of chapter 81 of title 5 [5 USCS §§ 8101 et seq.]; or

Whoever receives a fee, or other consideration, or gratuity on account of legal or other services furnished in respect to a case, claim, or award for compensation under subchapter I of chapter 81 of title 5 [5 USCS §§ 8101 et seq.], unless the fee, consideration, or gratuity is approved by the Secretary of Labor—

Shall, for each offense, be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 293. Limitation on Government contract costs

(a) Any proceeding costs incurred in connection with any proceeding brought by the United States or a State government that relates to a violation of, or failure to comply with, any Federal or State law or regulation on the part of the contractor are not allowable costs in a covered contract if the proceeding results in any of the following:

(1) an indictment by a Federal grand jury, or a conviction (including a conviction pursuant to a plea of nolo contendre) by reason of such violation or failure to comply;

(2) the assessment of a monetary penalty by reason of a civil or administrative finding of such violation or failure to comply;

(3) a civil judgment containing a finding of liability, or an administrative finding of liability, by reason of such violation or failure to comply, if the charges which are the subject of the proceeding involve fraud or similar offenses;

(4) a decision to debar or suspend the contractor or rescind, void, or terminate a contract for default, by reason of such violation or failure to comply,

(5) the resolution of the proceeding by consent or compromise, where the penalty or relief sought by the government included the actions described in paragraphs (1) through (5).

(b) In any proceeding brought by the United States or a State government that does not result in any of the actions described in paragraphs (1) through (5) of subsection (a), costs for legal services incurred by a contractor in connection with such proceeding shall not be allowed in excess of the rate specified in the Equal Access to Justice Act (28 U.S.C. 2412(d)(2)(A); 5 U.S.C. 504(a)) unless the responsible contracting officer finds that a special factor (such as the limited availability of qualified attorneys or agents) justifies an award of higher rates.

(c) For purposes of this section—

(1) the term "covered contract" means a contract for an amount more than $100,000 entered into by a department or agency of the United States other than a fixed-price contract without cost incentives;

(2) the term "proceeding" means a civil, criminal, or an administrative investigation, prosecution, or proceeding; and

(3) the term "proceeding costs" means all costs relating to a proceeding incurred before, during, or after the commencement of the proceeding, and such term includes—

(A) administrative and clerical expenses;

(B) the cost of legal services (whether performed by an employee of the contractor or otherwise);

(C) the cost of the services of accountants and consultants retained by a contractor; and

(D) the salaries and wages of employees, including officers and directors.

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CHAPTER 47—FRAUD AND FALSE STATEMENTS

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Sec.
1028. Fraud and related activity in connection with identification documents.

1029. Fraud and related activity in connection with access devices.
1030. Fraud and related activity in connection with computers.
1031. Major fraud against the United States.

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§ 1030. Fraud and related activity in connection with computers.

(a) Whoever—* * *

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(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

SEC. 1031. MAJOR FRAUD AGAINST THE UNITED STATES.

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

(1) to defraud the United States; or

(2) to obtain money or property from the United States by means of false or fraudulent pretenses, representations, or promises,

in any procurement of property or services for the Government, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more, shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.

(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and

(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

(2) the offense involves a conscious or reckless risk of serious personal injury.

(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10 million.

(d) Nothing in this section shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).

(e) The amount of any fine imposed under this section shall be proportional to the offense. In determining the amount of the fine, the court shall take into account—

(A) the egregiousness of the conduct proven at trial;

(B) the amount of the loss or gain resulting therefrom;

(C) any past convictions or judgments for fraudulent or other illegal acts against the United States entered against the defendant; and

(D) any other factors deemed by the court to be relevant to determining the amount of the fine to be imposed.

(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time allowed under 18 U.S.C. section 3292.

(g)(1) Upon application by the Attorney General, the court may order a payment from a criminal fine under this section to an indi-

vidual who furnished information leading to the conviction under this section. The amount of such payment shall not exceed the lesser of $250,000 or 10 percent of the criminal fine imposed under this section.

(2) An individual is not eligible for such a payment if—

(A) that individual is an officer or employee of a government who furnishes information or renders service in the performance of official duties;

(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual had justifiable reasons for that failure;

(C) the furnished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government; or

(D) that individual participated in the violation of this section with respect to which such payment would be made.

(h) Any individual who—

(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution), and

(2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

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